

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2046

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

TAYLOR DILLARD, :

Petitioner-Appellant :

- against - :

DOCKET NO. 77-2046

J. EDWIN LaVALLEE, Warden of the Clinton :
Correctional Facility, and BENJAMIN WARD, :
Commissioner of the New York State Depart- :
ment of Correctional Services, :

Respondents-Appellees :

-----x

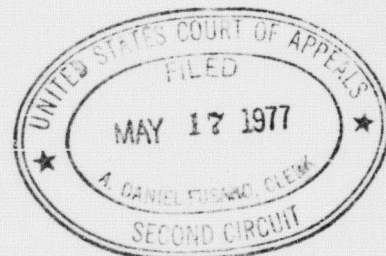
APPENDIX FOR PETITIONER-APPELLANT

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Petitioner-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York 11501

OF COUNSEL:

MATTHEW MURASKIN
MICHAEL J. OBUS



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>PAGE NO.</u>
MEMORANDUM AND ORDER DENYING PETITION	A-1
NOTICE OF APPEAL	A-10
CERTIFICATE OF PROBABLE CAUSE	A-11
MINUTES OF HEARING	A-12
MINUTES OF SENTENCE	A-20
ORDER OF AFFIRMANCE OF THE NEW YORK APPELLATE DIVISION FOR THE SECOND DEPARTMENT	A-30
CERTIFICATE DENYING LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS	A-31

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TAYLOR DILLARD,

Petitioner,

- against -

J: EDWIN LaVALLEE, Warden of the
Clinton Correctional Facility, and
BENJAMIN WARD, Commissioner of the
New York State Department of
Correctional Services,

Respondents.

DOCKET NO. 76 C 1929

MEMORANDUM AND ORDER

PRATT, J:

By habeas corpus, 28 USC §2254, petitioner seeks to review his sentence as a second felony offender which was imposed on February 3, 1975 in the County Court, Nassau County, after a jury trial and conviction of robbery in the first degree. The Appellate Division, Second Department, unanimously affirmed the judgment of conviction on May 10, 1976. Leave to appeal to the New York Court of Appeals was denied on June 15, 1976.

In support of his request for issuance of a writ of habeas corpus, petitioner contends that New York State has denied him the equal protection of the laws as guaranteed by

the fourteenth amendment by sentencing him under the second felony offender statute, NY Penal Law §70.06, which then read
in pertinent part: ^{1/}

1. Definition of second felony offender.

(a) A second felony offender is a person who stands convicted of a felony defined in this chapter, other than a class A felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized irrespective of whether such sentence was imposed;

* * *

3. Maximum term of sentence. The maximum term of an indeterminate sentence of a second felony offender must be fixed by the court as follows:

(a) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;

* * *

4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

Since he had been convicted of the felony of driving while
intoxicated ^{2/} in 1971, petitioner's 1975 conviction for robbery

automatically invoked the provisions of §70.06, and he was sentenced to an indeterminate term of four and one-half to nine years, rather than the zero to twenty-five-year term which may be imposed on one who commits a class B felony as a first offense. Had the sequence of his two convictions been reversed, petitioner correctly notes, that is, had the robbery conviction preceded the conviction for driving while intoxicated, then the provisions of §70.06 would not have been invoked, and petitioner would not have been subject to a mandatory minimum jail term. Indeed, the trial court indicated at the imposition of sentence that it would have given a less severe sentence if it had not felt bound by §70.06. People v. Dillard, Index No. 40111, Minutes of Sentence at 8-9 (County Court, Nassau County, Feb. 3, 1975).

Petitioner urges that this disparity in treatment of persons who have committed identical offenses, albeit in a different order, creates an irrational and arbitrary classification violative of equal protection. Although petitioner's order-of-offense argument has a simple, superficial appeal, closer analysis of the problem reveals that the issue is not quite so simple, the argument not quite so appealing. For the reasons set forth below, the request for

habeas corpus relief must be denied.

It is a proper function of the legislature to define crimes and prescribe punishments, Furman v. Georgia, 408 US 238 (1972); Weems v. United States, 217 US 349 (1909), and, in enacting §70.06, New York has decided that "a compelling state interest in public safety is promoted and enhanced by incarceration because of its deterrent effect and because it removes from society an individual who has been previously guilty of committing a felony". People v. Butler, 46 App Div 2d 422, 425 (4th Dep't 1975). Accord, United States ex rel. Mercogliano v. County Court of Nassau, 414 F Supp 508 (EDNY), aff'd on opn. below, Docket No. 76-2064 (CA2 Nov. 17, 1976); Cruz v. Bombard, Civil No. 76 C 702 (EDNY Oct. 6, 1976); People v. Parker, 41 NY 2d 21 (1976).

In furtherance of this interest, the legislature has also determined that, although a "predicate" felony under the statute may be (1) a felony defined in the Penal Law, (2) a felony defined by New York outside the Penal Law, or (3) an out-of-state conviction punishable by more than one year's imprisonment, it is only when a felony "defined in this chapter", viz. the Penal Law, is committed after an earlier predicate conviction that operation of the second felony offender statute

is triggered. In effect, the legislature has determined that a Penal Law conviction which follows a conviction for a felony defined outside the Penal Law indicates a more serious disregard for the laws of society than does a Penal Law felony standing alone. Accordingly, it is not unreasonable that such a felony be punished more severely and New York has done "no more than describe circumstances under which increased punishment may be imposed by a sovereignty". People v. Wilson 13 NY2d 277, 281, appeal dismissed, 377 US 925 (1964). Accord, Cruz v. Bombard, supra.

Nonetheless, petitioner claims that §70.06 violates equal protection by permitting two individuals who have committed the same crimes, but in a different sequence, to be subjected to different penalties. Specifically, petitioner argues that there is an unconstitutional paradox in this statute since it exempts from its operation a person who after being convicted of a Penal Law felony (e.g., robbery) is then convicted of a non-Penal Law felony (e.g., driving while intoxicated), while it serves to punish more severely one, like petitioner, who commits the same crimes in reverse order. Such a difference in treatment, however, is neither arbitrary nor irrational. What petitioner ignores is that he

was tried, convicted, and sentenced for the felony of armed robbery and not for some hybrid felony, consisting of a combination of the felonies of drunken driving and armed robbery.

In determining the punishment for armed robbery, the prior record of a defendant is a relevant factor, just as it would be with every conviction, Williams v. New York, 337 US 241, 69 SCt 1079, rehearing denied, 337 US 961, 69 SCt 1529 (1949). By this second felony offender statute the legislature has prescribed minimum sentences for anyone who has a prior felony conviction. Thus the prior conviction not only becomes a relevant factor for judicial consideration in arriving at an appropriate sentence for the Penal Law conviction, but it also provides a "floor" or minimum below which the judge's sentencing discretion may not reach. Once convicted of driving while intoxicated, a felony in New York, petitioner was on notice that any subsequent Penal Law felony conviction would subject him to the stringent sentencing mandate of the second felony offender statute. In the instant case, the purpose of the statute -- incarceration and isolation of repeating offenders -- has been effected and it cannot be said that the application of the second felony offen-

der statute here was either irrational or arbitrary. Cf. U.S. v. Raines, 362 US 17, 21, 80 Sct 519, 529 (1960)("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.")

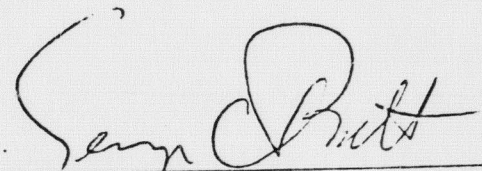
Equal protection does not require mathematical precision. See Marshall v. United States, 414 US 417 (1974); McGinnis v. Royster, 410 US 263 (1973). The potential sentence of an ex-drunken driver now convicted of robbery need not constitutionally be equal to that prescribed for an ex-robber now convicted of drunken driving. New York's Legislature has exercised its considered judgment in devising a statutory scheme under which traditional forms of criminal conduct -- e.g., murder, rape, arson, robbery, theft -- are defined within the Penal Law while some other anti-social acts are defined as crimes in other chapters of the state's laws. The legislature has made the further judgment that upon a defendant's conviction of a traditional Penal Law felony, more severe punishment is warranted whenever there has been a prior felony conviction regardless of the source of its definition. The statute's sentencing requirements are activated only upon con-

viction of a Penal Law felony, and it is this crime for which sentence is ultimately imposed. Thus, it is not the order of the crimes, but the identity of the second crime as a Penal Law felony which activates the second felony offender statute. Such a scheme is both rational and well within the legislative discretion.

Accordingly, since section 70.06 of the New York Penal Law as devised and applied did not impose upon the petitioner an unreasonable or arbitrary classification violative of his equal protection guarantees, the petition for issuance of a writ of habeas corpus must be dismissed.

SO ORDERED.

Dated: Westbury, New York
April 4, 1977



GEORGE C. PRATT
U. S. DISTRICT JUDGE

F O O T N O T E S

1/ In 1975 NY Penal Law §70.06(1)(b)(i) was amended to read:

For the purposes of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed * * *.

2/ NY Vehicle and Traffic Law §1192 defines driving while intoxicated as a misdemeanor if a first conviction and as a felony upon a subsequent conviction. Hence, petitioner had been convicted of driving while intoxicated at least twice within a ten-year period. Id. §1192(5).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x

TAYLOR DILLARD, :

Petitioner :

- against - :

J. EDWIN LaVALLEE, Warden, Clinton : NOTICE OF APPEAL
Correctional Facility, and BENJAMIN :
WARD, Commissioner of the New York : 76-C-1929
State Department of Correctional :
Services, :

Respondents :

----- -x

S I R S :

PLEASE TAKE NOTICE that the above named TAYLOR DILLARD
hereby appeals to the United States Court of Appeals for the
Second Circuit from a judgment of the United States District
Court, Eastern District of New York, rendered April 4, 1977,
and from each and every part of said judgment.

Yours, etc.,

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society
Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York 11501

DATED: Mineola, New York
April 6, 1977

TO: HON. DENIS DILLON
District Attorney
Nassau County

CLERK, EASTERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

APR 18 REC'D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEGAL DEPARTMENT
CRIMINAL DIVISION

- - - - - x

TAYLOR DILLARD,

DOCKET NO. 76 C 1929

Petitioner,

- against -

O R D E R

J. EDWIN LaVALLEE, Warden of the
Clinton Correctional Facility, and
BENJAMIN WARD, Commissioner of the
New York State Department of
Correctional Services,

Respondents.

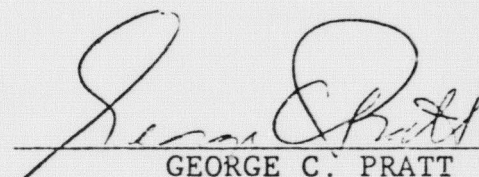
- - - - - x

PRATT, J:

Petitioner's request for issuance of a Certificate
of Probable Cause to pursue his appeal of the undersigned's
memorandum and order dated April 4, 1977 which dismissed his
petition for a writ of habeas corpus is granted.

SO ORDERED.

Dated: Westbury, New York
April 11, 1977.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

COUNTY COURT : NASSAU COUNTY

PART II

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

-against-

: Ind. #40111

TAYLOR DILLARD,

Defendant.

:

:

-----X

Mineola, New York
October 24, 1974

B e f o r e:

HON. DOUGLAS F. YOUNG,

County Court Judge

A p p e a r a n c e s:

ROGER HAUSCH, ESQ.

Assistant District Attorney

for the People

JAMES J. McDONOUGH, ESQ.

Legal Aid Society

BY: JAMES TINI, ESQ., of Counsel

for the Defendant

SUPPRESSION HEARING

Ellen Sesskin, C.S.R.
Official Court Reporter

THE CLERK: People v. Taylor Dillard, Indictment 40111.

People ready for hearing?

MR. HAUSCH: People ready, Your Honor.

THE CLERK: Defendant ready?

MR. TINI: After a few preliminary matters, Your Honor, concerning this case, the defendant will be ready.

MR. HAUSCH: Your Honor, may the record reflect that I am issuing to the Court a copy of the information charging the defendant with being a prior felony offender and further serving a copy on Mr. Tini and on the defendant.

MR. TINI: Your Honor, at this time I will acknowledge receipt of the statement of the District Attorney concerning the status of Mr. Dillard, the defendant in this case, as a prior felony offender. However, I wish to controvert and request a hearing on the issue of whether or not Mr. Dillard is in fact a prior felony offender. I would request that a hearing to determine his status be conducted prior to any further proceedings on this case. I would ask for an immediate hearing. I believe the People may be prepared to proceed with it. I would like that request stating the following: The issue of whether or not Mr. Dillard is a prior felony offender is one where there may be merit in finding him -- in a Court's finding him not a prior felony offender, inasmuch as the predicate

felony described in the papers served on the defendant this morning indicate a conviction of driving while intoxicated which appears in the Vehicle and Traffic Law rather than the Penal Law. And that there are cases now pending, I believe on information and belief, in the Appellate Division concerning or characterizing felony convictions under the Vehicle and Traffic Law as either felonies, convictions constituting felonies under the PFO statute or not. And this matter is in some degree before the Appellate Division at this time. I would also ask --

THE COURT: It is also before the Nassau County Court.

MR. TINI: Exactly.

THE COURT: In another part.

MR. TINI: Yes. I would also ask that the hearing be conducted at this time, inasmuch as I feel where there is any doubt at all that a defendant is a prior felony offender, effective plea negotiations cannot be effectuated. There can't be any possible realistic plea negotiations or conferencing of the case. And I rely upon New York v. Santaello, 404 U.S. 257, which is a United States Supreme Court case, as well as an opinion written by Justice Breitel in the New York State of Appeals in People v. Sheldon Seikoff and People v. Tim Campbell and People v. Robert Davidson. These are all '73 or '74 cases which recently were appealed.

And Judge Breitel wrote an opinion on these cases. And that these two opinions indicate the Supreme Court's interest in giving it a bit of respect and importance to plea negotiations. The cases indicated are indicative that plea negotiations is an integral part of the judicial system. And I bring this into my argument by merely stating that the PFO status of this defendant is not established, that in effect he is being deprived of an integral part of the judicial process in not being able to have his attorney realistically negotiate a plea.

Therefore, I would ask before we continue with any kind of a hearing, I am ready to proceed on the hearing today, but I am also ready to proceed on a hearing to indicate whether or not this defendant is a prior felony offender. And I would ask that that precede any further proceedings in this case.

MR. HAUSCH: Your Honor, as to the determination as to whether the defendant is a prior felony offender, the People would rely upon the language of the statute. To the best of my knowledge and to the knowledge of our law department, there have been no appellate cases in a point decided upon this issue as of this time. And the only position the People or I feel this Court can realize is the actual language of the statute. As far as a hearing is concerned,

the People do have a copy of the minutes of the plea and sentence by Judge Tomson of this Court upon the defendant Taylor Dillard, finding him guilty by a plea to driving while intoxicated as a felony. These minutes are dated May 6, 1971.

THE COURT: Well, as I take it, Mr. Tini is not questioning the record as to the conviction.

MR. HAUSCH: That is my understanding.

THE COURT: Or the nature of the conviction, but only, as he has just set forth, the effect of that situation.

MR. HAUSCH: Yes, Your Honor. It would be our position that a hearing should not be held at this time, again based upon the language of the hearing -- of the statute not making any provision for such a hearing prior to the determination or the decision as to sentence. And --

THE COURT: Well, I'm sorry, did I interrupt you?

MR. HAUSCH: Your Honor, in line with Mr. Tini's comments, I was going to offer this set of minutes to the Court and ask the Court to take judicial notice of the conviction and ask that Mr. Tini stipulate that it was in fact this defendant now before the Court who did enter such a plea, because I believe we are not arguing against the actual conviction of the defendant.

THE COURT: Well, that is the sense of what I stated

before. You agreed, didn't you, Mr. Tini? You are not contesting that this conviction occurred and was a conviction of driving while intoxicated as a felony and it was of Mr. Dillard?

MR. TINI: I believe at this time I have no reason to believe that this was not a conviction in this County and was a conviction of driving while intoxicated as a felony. I have no reason to disbelieve that. I won't go as far as stipulating. I would ask the People to present their burden, which is simple enough for them to do, since it is in this County. However, I think the thrust of my hearing would be the characterization of the Vehicle and Traffic felony. It would be our position that that is merely deemed a felony. It is not such a felony that would constitute a predicate felony under the statute. That would be the major thrust of the hearing as far as the defendant is concerned.

THE COURT: Well, I will take judicial notice of the Court's own records. And that I think establishes a conviction of the nature we have stated. If there is any question about it, we can get the record of conviction from the County Clerk's office. But I am somewhat at a loss, Mr. Tini, to know what a hearing would serve in this situation. I don't know what would be produced at this hearing.

It seems to me either a simple question of determination by me at this time as it were of whether we proceed without resolution on that question or whether I determine that the statute provides for it to be a second felony offender charge laid, or not.

What do you mean by a hearing?

MR. TINI: Well, the statute permits, the statute permits the defendant to controvert for several reasons the filing of a -- or the effectiveness of a prior felony offender information as the District Attorney's office describes it. And the defendant may controvert it on several issues, one of which being the characterization of the particular predicate felony as in fact a felony. The characterization of the conviction, that is what we wish -- I wish to determine that at this point, so that I will know whether or not in proceeding we have a prior felony offender situation. As a very practical matter, whether or not by proceeding to trial which we are on the eve of --

THE COURT: I don't think we have any real problem here. I'm drawing a distinction between a hearing and a determination on the statements presented without a hearing. A hearing, as I view it, involves calling witnesses who are sworn and testify or submitting documents which are received in evidence. And you are simply going on the statute, an

interpretation of the statute. And all I have to do is make a determination.

MR. TINI: Very well, very well.

THE COURT: And it is my determination that this would constitute a second felony conviction if a conviction were to occur in this case. And that the prior conviction in this court on the day which has been stated, in 1971 I believe you said, Mr. Hausch?

MR. HAUSCH: Yes, Your Honor, May 6, 1971.

THE COURT: Is a valid predicate for conviction as a second felony offender in any subsequent felony conviction.

So we have a search and seizure hearing I understand?

MR. HAUSCH: Yes, Your Honor. Plus, the People at this time do anticipate offering into evidence certain statements made by the defendant.

THE COURT: I do not believe any papers have been served or a hearing has been formally requested of the Court.

MR. TINI: That's correct, Your Honor; no papers have been served. However, I would move this Court at this time for a pre-trial ruling that the People be precluded from entering any oral statements in this case. The first time I heard about an oral statement in this case was yesterday from the Assistant District Attorney, Mr. Hausch. And upon checking my files, a motion was made, a discovery

Copy m. c. Donoghue
Ind. # 415 72 325
gn.

COUNTY COURT : - NASSAU COUNTY

PART VII

----- x
THE PEOPLE OF THE STATE OF NEW YORK :

- against - :

TAYLOR DILLARD, :

Ind. #40111

Defendant. :

----- x
Mineola, New York
February 3, 1975

B e f o r e :

HON. DOUGLAS F. YOUNG,

County Court Judge

Appearances:

KENNETH WEINSTEIN, ESQ.,
Assistant District Attorney

for the People

JAMES J. MC DONOUGH, ESQ.,
Legal Aid Society
By: JAMES TIMI, ESQ.,

for the Defendant

MINUTES OF SENTENCE

MICHAEL YESNLE
Official Court Reporter

BEST COPY AVAILABLE

2
THE CLERK: People vs. Taylor Dillard.

You are Taylor Dillard?

THE DEFENDANT: Yes.

THE CLERK: And you appear here with your attorney, James Tini of the Legal Aid Society, under indictment 40111 for sentencing, is that correct?

THE DEFENDANT: Yes, sir.

THE CLERK: Taylor Dillard, having had a hearing on a prior felony offender, do you now wish to be sentenced?

THE DEFENDANT: Yes.

THE CLERK: Does the district attorney wish to be heard on this matter?

MR. WEINSTEIN: No, if your Honor please, the People take no position and make no recommendation on sentence.

THE CLERK: Mr. Tini, do you wish to be heard?

MR. TINI: Only briefly, your Honor. There has been an extensive pre-sentence conference with your law secretary and with yourself concerning this matter. Mr. Dillard is 46 years old. He lives with his sister. His sister owns her own home and has owned it for some time. He has worked all of his life, save two periods of time when, once, briefly he was on

unemployment and another, briefly, he was on welfare. That was after he was released from the Nassau County Jail. He found it difficult to find a job, and he went on welfare briefly. He is a hard-working man who I have gotten to know. His occupation is carpentry, painting and concrete work. He is right now self-employed, relatively steady work for that kind of work, however, not the type of steady work that would render him a wealthy man.

He sat before your Honor for an extended period of time during trial. He has appeared at every time, every court appearance as far as I know he has appeared and made himself available for the trial. He has aided his attorney in the preparation of his trial as best he possibly could, and, your Honor, his prior record is before the Court. A Duffy-Sandoval hearing had been made in this case, and the prior record, the defendant's prior record, was gone into in depth along with the underlying charges of the underlying acts constituting the charge. He is a prior felony offender. A hearing had been held, and it was determined in the Duffy hearing that most of his -- or my interpretation of the Duffy was that most of his, if not all I will submit to the Court that all of his prior offenses and

4

his prior convictions are either directly as a result of public intoxication or directly as a result of intoxication, or tangential to an intoxicated act, or an act committed under intoxicification.

I would at this time ask that the Court be as lenient as possible in sentencing Mr. Dillard, understanding that he is a prior felony offender.

I would also submit to the Court that I understand under the Law of the State of New York the Court has no choice but to sentence this defendant to a minimum sentence, and I am sure that if this defendant was not a prior felony offender the Court would be very amenable to sentence him to some sort of probationary program by which he could get the needed treatment for his alcoholism.

Now, over the past -- from trial, or from verdict to sentence, which has been an extended period of time, Mr. Dillard has controlled his alcohol problem substantially and just about completely by refraining from the use of alcohol. But, as I stated, I submit to the Court that I am positive that if he were not a prior felony offender the Court would show leniency and understanding in sentencing him to a non or a very limited penal type sentence rather than the type of

sentence that the legislature has compelled this Court
to sentence this defendant to.

THE CLERK: Mr. Dillard, do you wish to be
heard in this matter?

THE DEFENDANT: No.

THE COURT: Do you wish to say anything con-
cerning sentence, Mr. Dillard?

THE DEFENDANT: No.

THE COURT: I see nothing in the file,
Mr. Tini and Mr. Masseri concerning the serving of the
notice on the defending of his being charged with
being a prior felony offender. Have you received such
a notice, Mr. Tini?

MR. TINI: Yes, your Honor, I received such a
notice. I don't know the exact date, but I received
it prior to trial.

MR. WEINSTEIN: Your Honor, if I may inter-
ject a moment: I have a copy of the minutes which were
taken at the suppression hearing before your Honor
dated October 24, 1974, and on Page 2 of those minutes,
if I may be permitted, with the Court's permission to
read them, I would read as follows: "Mr. Hausch: Your
Honor, at this time I will acknowledge receipt of a
statement of the district attorney concerning the

status of Mr. Dillard, the defendant, in this case, as a prior felony offender."

And then it continues thereafter for several pages thereafter a discussion between Mr. Tini, Mr. Hausch and your Honor relative to a hearing that Mr. Tini was requesting concerning the status of the defendant.

THE COURT: Well, my recollection is that there was that discussion and that the hearing was requested and was granted limited to the question of whether the conviction here would cause the defendant to be a prior felony offender. Am I correct in that, Mr. Tini?

MR. TINI: Yes, your Honor.

THE COURT: And the Court issued its ruling that this was so. In other words, that the conviction of operating a motor vehicle while in an intoxicated condition as a felony was a predicate for treating the defendant as a second felony offender.

MR. WEINSTEIN: Yes, your Honor, so ruled on Page 8 of the hearing minutes, and I read as follows: "The Court: And it is my determination that this would constitute a second felony conviction if a conviction were to occur in this case, and that the prior conviction in this Court on the day which has been stated in

1971, I believe you said, Mr. Hausch --

"Mr. Hausch: Yes, your Honor, May 6, 1971.

"The Court: -- is a valid predicate for conviction as a second felony offender in a subsequent felony conviction."

MR. TINI: There was as well, your Honor, a stipulation which continues at this time that we would not wish to controvert the fact that on or about the 6th day of May, 1971, this gentleman standing before your Honor, the defendant, Taylor Dillard, was, in fact convicted of operating a motor vehicle while in an intoxicated condition as a felony, and at this time, if the Court wishes to re-arraign him on this, he will not dispute that fact.

THE COURT: Well, I will simply ask him if that is the case.

Mr. Dillard, are you admitting to being the person who was convicted on the 6th day of May, 1971 in Nassau County of the crime of operating a motor vehicle while in an intoxicated condition as a felony?

THE DEFENDANT: Yes.

THE COURT: All right. I so find that the defendant is a second felony offender.

This is a situation which is not welcome to

this Court, and I am of the opinion that the application of this law is particularly harsh, and it involves a punishment which is out of proportion to the crime, although the crime of which the defendant is convicted is a very serious one and does call for punishment, even though there may have been an alcoholic influence which operated on the defendant at the time. But it is my feeling that the statute and the circumstances such as we have here does not give sufficient latitude to the Judge to exercise his discretion and to consider a sentence which is in keeping with the nature and background of the crime.

Having said that, I have no alternative but to follow the provisions of the law and to sentence the defendant at least to the minimum provided under the law for the crime of which he is convicted. As I have said, it is a particularly serious crime, and in most circumstances the sentence which is called for here would, I believe, be a reasonable one, but I don't think that Mr. Dillard was acting in the furtherance of a really heinous crime. I think he was perhaps partly a victim of circumstances when this incident occurred. Of course, he bears some responsibility, or much responsibility because of his getting

9

himself in a condition where he participates in an incident of this kind. But, nevertheless, I do feel that the sentence which is required here is unnecessarily harsh.

It is the judgment of the Court that for the crime of which you stand convicted by the verdict of the jury that you be committed to the custody of the State Department of Corrections at Greenhaven Correctional Facility at Stormville, New York, as a second felony offender pursuant to Section 7006 of the Penal Law for an indeterminate term, the maximum of such imprisonment not to exceed nine years, and the minimum to be four and a half years.

Mr. Tini, you are directed to advise the defendant in writing of his right to appeal, of his right to have the expenses of the appeal paid if he cannot afford them, and I understand you are about to file your notice of appeal immediately.

MR. TINI: I will, your Honor.

THE COURT: The defendant will be held in the custody of this Court -- are you doing that right away?

MR. TINI: Right away.

THE COURT: With the clerk and with the district attorney?

MR. TINI: Yes, your Honor.

THE COURT: You will hold him in the custody of the Court for the next fifteen minutes until you return.

MR. TINI: Thank you very much.

MR. WEINSTEIN: If your Honor please, am I to understand that the Court will grant a stay of execution pending appeal to the defendant?

THE COURT: Yes, I am prepared to do that if the appeal is filed.

MR. WEINSTEIN: May I most respectfully note my objection to your Honor's decision for the record?

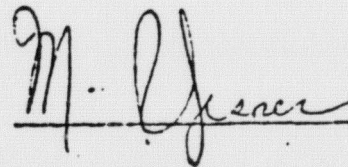
THE COURT: Certainly.

MR. WEINSTEIN: Thank you, Judge.

- - -

C E R T I F I C A T I O N :

I hereby certify the above minutes to be true and accurate.



At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on **May 10, 1976.**

HON. HENRY J. LATHAM, Acting Presiding Justice,

~~HON. FRANK M. MONTAGNA~~

~~HON. JAMES M. GOPEINS~~

~~HON. JAMES M. GOPEINS~~

~~HON. JAMES M. GOPEINS~~

~~HON. JOHN R. KELLY~~

HON. CHARLES MARGETT,

HON. VINCENT D. DAMIANI,

~~HON. JAMES M. GOPEINS~~

HON. SAMUEL RABIN,

~~HON. JAMES M. GOPEINS~~

~~HON. JAMES M. GOPEINS~~

HON. JOSEPH F. HAWKINS,

Associate Justices

The People of the State of New York,

Respondent,

v.

Taylor Dillard,

Appellant

Order on Appeal from
Judgment of Conviction

In the above entitled action, the above named **Taylor Dillard,**

defendant in this action, having appealed to this court from a judgment of the **County**

Court, **Nassau** County, rendered **February 3, 1975;**

and the said appeal having been **argued** by **NORMAN S. HALL,**

Esq., of counsel for the appellant, and **argued** by **Anthony J. Girese,** Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's
decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby **unanimously affirmed, and it is further**

ORDERED that the case is hereby remitted to the County Court, Nassau
County for further proceedings pursuant to CPL 460.50 (subd. 5).

Enter.

IRVING N. SELKIN

Clerk of the Appellate Division

State of New York

Court of Appeals

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

CERTIFICATE

against

DENYING

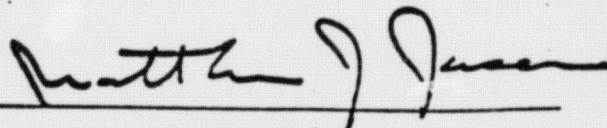
TAYLOR DILLARD,

LEAVE

Appellant.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Buffalo, New York
June 15, 1976.


Associate Judge

Order of Appellate Division, Second Department,
rendered May 10, 1976, affirming Nassau County
*Description of Order: Court judgment rendered February 3, 1975.

James M. McDonough, Esq.
Attorney-in-Charge, Criminal Division
Legal Aid Society of Nassau County
400 County Seat Drive, Mineola, New York 11501
ATTN.: Norman S. Hatt, Esq.

Hon. Denis Dillon
District Attorney of Nassau County
262 Old Country Road, Mineola, New York 11501
ATTN.: Anthony Gerace, Esq.

SUBMITTED PAPERS
RETURNED.



JUN 17 1976

LEGAT
CRIMINAL DIVISION